THE UNIVERSITY OF CHICAGO

MODERN DAY PIRATES*:*

LEGAL AND STATUTORY REFORMS

FOR ALIEN TORT STATUTE ACCESSORY LIABILITY

POST-*NESTLÉ*

A THESIS SUBMITTED TO

THE PROGRAMS IN LAW, LETTERS, AND SOCIETY AND PUBLIC POLICY

IN PARTIAL FULFILLMENT OF THE

REQUIREMENTS FOR THE DEGREE OF

BACHELOR OF ARTS

PAPER PRESENTED TO:

PUBLIC POLICY STUDIES PRECEPTOR, DANIEL SONNENSTUHL

LAW, LETTERS, AND SOCIETY FACULTY ADVISOR, JARED BERKOWITZ

BY

ANNA GUZMAN

JUNE 2024

Abstract

The US Supreme Court has made recent moves to substantially limit the scope of the Alien Tort Statute, one of the most promising mechanisms for transnational litigation and corporate accountability in the US. This paper explores a path forward for ATS litigation by proposing two strands of legal and policy reform. Leveraging the considerable history grounding the statute, this paper argues that reform to current legal standards is necessary given the context of ATS litigation. This paper unveils substantial inconsistencies within the Court's current standards for adjudicating both procedural and substantive claims under the ATS and argues that this disconnect has significant consequences for the future of human rights, transnational litigation, and corporate accountability. Thus, this paper contextualizes the history of the ATS through an alternative reading of accessory liability, the Law of Nations, and international law. It then proposes a multi-faceted remedy for the ATS' insubstantial legal framework.

Introduction

"[The Alien Tort Statute] is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act…no one seems to know whence it came."

- Judge Henry Friendly[1] (IIT v. Vencap, Ltd, 1975)

In 1789, the First Congress of the US passed the Alien Tort Statute (ATS), one of the first articulations of the complex relationship between international and domestic law in the US. Over the last 200 years, the American human rights community has come to view the ATS as "a badge of honor" that contributes to the standing of the United States as a "champion of international law." (Roberts, 2006) The ATS has been mechanized in a vast array of cases, allowing courts to hear claims of forced labor, genocide, involuntary medical experimentation, systematic denial of political and free speech rights, the harmful effects of aerial pesticide fumigation, and more (Hathaway, 2022). Since its re-emergence as a statutory instrument in the mid 1970s, the ATS has garnered "worldwide attention" and has become the "main engine for transnational human rights litigation in the United States." (Wuerth, 2013)

The ATS is a short statute but has served as a source of vibrant scholarly debate. It provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or a treaty of the United States." (Alien Tort Statute, 1789) For the purposes of the ATS, a tort is defined as an act or omission that causes legally cognizable harm to persons or property. In this context, the ATS provides the

[1] This oft-quoted reference speaks to the mysterious knight in an opera by Richard Wagner. Like the titular Lohengrin possessing "superhuman charisma and fighting ability," the Alien Tort Statute has been heralded for its utility as a mechanism for human rights accountability. It has also attracted intense scrutiny for its mysterious origin.

statutory language necessary for the operation of tort law on behalf of foreign nations.[2] When legally cognizable harms occur outside of the geographic jurisdiction of the US and violate international law, foreign nationals can use the ATS to seek legal remedy in the US judicial system. These procedures have stirred enormous controversy within the international legal community. On one side of the debate, legal scholars like Beth Stephens regard the statute as "a means to hold the most egregious perpetrators accountable for the most egregious violations of international law." (Stephens, 2004) This idea is supported by the hundreds of affirmative decisions resulting from ATS litigation, which have brought justice to a wide variety of victims.[3] However, other scholars worry about potential implications for foreign relations. These commentators worry that the foreign application of the ATS threatens the principles of sovereignty that govern contemporary international relations, thereby placing US interests at "loggerheads" with "traditional allies, trading partners and developing countries." (Hufbauer and Mitrokostas, 2003)

Echoing the concerns of these critics, the US Supreme Court has drastically narrowed the scope of the ATS in recent years. Cases like *Kiobel v. Royal Dutch Petroleum Co., Jesner v. Arab Bank, PLC,* and *Nestlé USA, Inc. v. Doe* have all substantially limited the reach and power of the ATS. These cases introduced additional requirements to establish jurisdiction under the

[2] Tort law is the body of rules concerned with remedying harms caused by wrongful or injurious acts (Coleman, 1988).

[3] Plaintiffs bring suits under the ATS for a variety of reasons. A survey of ATS plaintiffs found the following breakdown in motivations: admittance of fault/responsibility (59%), non-repetition (59%), answers/truth (53%), apology (41%), retribution for conduct (41%), acknowledgement of harm (35%), and punishment (24%). The ATS has been successful in securing these diverse goals. Victims who brought suit under the ATS in the *Khulumani* lawsuit were quoted: ("The ATS suit was one of the most hopeful things that happened for victims and survivors. . .. [I]t lit a flame in everyone's hearts and minds that if we can't get justice in South Africa, we can get it in the U.S. through the ATS.") (Relis, 2007)

ATS: most notably, the cases must "touch and concern" U.S. territory with "sufficient force." (Kiobel v. Royal Dutch Petroleum Co., 2013) For example, in *Nestlé,* the Supreme Court found that the corporation's supply chain, which included alleged child slave labor in the Ivory Coast, was not sufficiently connected to the US. Because of this, the Court held that the case could not be heard under the ATS. These interpretive jurisdictional challenges have presented substantial obstacles for litigators determined to use the ATS as a tool for transnational litigation and corporate accountability.

Despite these challenges, the scope of ATS liability for corporations aiding and abetting human rights violations has been left largely unanswered. This provides a potential mechanism for future innovation under the ATS. While theories of accessory liability have motivated ATS litigation, the Supreme Court has yet to rule on its validity.[4] Some Circuit Courts have dismissed cases and concluded that accessory liability does not satisfy the standards of ATS liability set out in *Sosa*.[5] Others have upheld liability or neglected to consider the question at all.[6] While the Supreme Court confronted the question of accessory liability in *Nestlé*, no conclusion was reached. In June 2023, two years after the decision in *Nestlé*, the Ninth Circuit confirmed accessory liability under the ATS in the case of *Doe I v. Cisco Systems, Inc* (Doe v Cisco Systems, Inc, 2023). There, the Ninth Circuit held that the accessory liability satisfied the

[4] Accessory liability is a common component of civil liability. It provides a mechanism through the law "holds a third party (the accessory, 'A') responsible for 'legal injury', often damage, suffered by a plaintiff ('P') as a result of a principal wrongdoer's ('PW') wrong, such that A is liable (to the same, or perhaps different, extent as PW) for the legal injury done to P." (Dietrich, 2010)

[5] *See e.g.* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

[6] *See* Presbyterian Church v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Aldana v. Fresh Del Monte Produce, Case Number: 01-3399-CIV-MORENO (S.D. Fla. Dec. 15, 2003); Cabello Barrueto v. Fernandez Larios, 205 F. Supp. 2d 1325 (S.D. Fla. 2002)

restrictive *Nestlé* standard for ATS litigation. This case poses an exciting potential for future legal innovation under the ATS, even in the post-*Nestlé* world.[7]

When *Nestlé* was decided, many commentators assumed that it signaled the death of the ATS.[8] *Cisco Systems*, however, is a surprising turn of events that could provide a blueprint for future litigation under the ATS.[9] Still, with a hostile Supreme Court intent on curbing the efficacy of the ATS at every turn, the statute's future remains uncertain. My thesis seeks to probe the uncertain future of ATS litigation: how could ATS litigation be restored after the decision in *Nestlé*?

Given the recent decision in *Cisco Systems*, I argue that accessory liability poses the greatest potential for legal accountability within the current judicial environment, and this framework should be centered in future litigation and reform. I contend that questions of accessory liability are best positioned to overcome the obstacles that threaten the future of ATS litigation: in particular, the presumption against extraterritoriality and the question of appropriate causes of action. By leveraging the history of accessory liability, this thesis evaluates two alternative legal standards to address current inconsistencies within the current doctrinal

[7] It is uncertain whether the *Cisco Systems* decision will be appealed to the Supreme Court. While further review is certainly a possibility, here I argue that Judge Berzon's reading of accessory liability is consistent with the *Nestlé* standard and should pass even Justice Thomas' restrictive interpretation of ATS jurisdiction, should future review occur. I also argue that accessory liability could be further enabled through statutory reform at the Congressional level.

[8] For examples of this common language across scholarly commentary, see Phillip Ayer's article "Nestlé v. Doe: A Death Knell to Corporate Human Rights Accountability?" which deems the decision in Nestlé a "death knell" to the ATS (Ayers, 2023) and Clara Petch's article "What Remains of the Alien Tort Statute after Nestlé USA, Inc. v. Doe?" which notes the "practical extinction of the statute." (Petch, 2022)

[9] While there is an overall lack of scholarly literature on the effects of *Cisco Sytems* on ATS litigation as of yet, scholars have expressed optimism after the opinion. For example, William Dodge noted that "[t]here may yet be life in the Alien Tort Statute (ATS)" in his article "Ninth Circuit Allows Human Rights Claims Against Cisco to Proceed." (Dodge, 2023)

framework. First, I argue in favor of Justice Breyer's alternative standard for evaluations of jurisdiction, which leverages the substance of US policy interests to justify the procedural scope of the statute in any given case. Second, in considering the substance of ATS claims, I propose a return to an original, expansive *Sosa* framework which encourages the evolution of ATS causes of action. For each standard, I explore potential mechanisms through which accessory liability could gain recognition within the current hostile jurisprudential environment, either through statutory or legal reform.

Part I of this paper contextualizes the legal history of the ATS and provides background for both the presumption against extraterritoriality and obstacles for ATS causes of action. Part II looks to the recent decision in *Cisco Systems*. While much of the scholarly community has heralded the *Cisco Systems* decision as an unexpected victory, I argue that *Cisco Systems* illuminates discrepancies in the current ATS jurisprudence and intensifies the need for reform. Part I and II function together as a review of the primary and secondary source literature on the Alien Tort Statute to date. They gloss the main scholarly debates surrounding extraterritoriality and causes of action and track these debates as ATS jurisprudence evolved. These sections also expose unanswered questions in ATS literature after the decision in *Cisco Systems* and contemplate the need for policy intervention to respond to these discrepancies.

Having briefed the main evolutions in ATS jurisprudences and tensions in scholarly literature, Part III turns to legal and policy analysis. Leveraging a thorough analysis of primary sources related to the statute's text, context, and history, Part III argues that the Nestlé "focus test" is an inappropriate standard, inconsistent with the history and purpose of the ATS. Part IV then turns to the question of causes of action under the ATS. This section looks first to the history of the statute, particularly at the intent of the framers to allow the ATS to evolve over

time and address diverse violations of the Law of Nations. Because of this statutory history, I argue that the current *Nestlé* standard for evaluating causes of action is ill-suited to the reality of the statute. I instead propose a return to the *Sosa* standard for substantive evaluations under the ATS. Finally, Part V proposes federal statutory reform to implement this updated legal framework and bring the ATS back in line with its original purpose.

Ultimately, this thesis explores the future of the ATS by situating this American legal history, tradition, and precedent within a larger global discourse about corporate power, human rights litigation, and economic accountability. From this context, I propose two alternative legal standards. These standards are more faithful to the history of the ATS, and better serve its uncertain future.

Part I: History and Background of the Evolution of the ATS

The Alien Tort Statute (ATS) was enacted by the First Congress as part of the Judiciary Act of 1789. Although it was just one sentence long, the ATS has been described as a "jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world." (Kiobel v. Royal Dutch Petroleum Co., 2010) It has attracted intense interest, scrutiny, and scholarly debate as it evolved from a rarely used jurisdictional statute to a prominent vehicle for foreign human rights redress in US Courts. The ATS provides federal district courts with the jurisdiction to hear cases from foreign nationals claiming civil liability for a tort committed in violation of either the Law of Nations or a treaty ratified by the United States. Although much of the original legislative history for the ATS is missing from the historical records, the Supreme Court held in 2018 that the original purpose of the statute was to "promote harmony in international relations." (Jesner v. Arab Bank, PLC, 2018) By ensuring foreign plaintiffs a remedy for international law violations, the newly-formed

US hoped to avoid "circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable." (Jesner v. Arab Bank, PLC, 2018, p. 25) The ATS was largely dormant for the first 190 years of its existence and was only invoked in two instances from 1789 to 1980.[10] However, in 1980, the US Second Circuit issued its decision in *Filártiga v. Peña-Irala.* The case held a Paraguayan citizen responsible under the ATS for torture as a violation of the Law of Nations. Crucially, the *Filártiga* court concluded that the ATS was meant to evolve, meaning that the Court should interpret "international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." (Filártiga v. Peña-Irala, 1980, p. 881) This gave rise to "an abundance of litigation in US district courts." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 111)

The Supreme Court first heard an ATS case in 2004, some twenty years after the decision in *Filártiga.* The case, *Sosa v. Alvarez-Machain,* concerned a Mexican doctor, Humberto Álvarez-Machaín, who alleged an arbitrary arrest by the US Drug Enforcement Administration and filed a suit under the ATS. The Court unanimously held against Álvarez-Machaín, ruling that the ATS did not create a separate ground for all suits in violation of the Law of Nations. The Court cautioned in *Sosa* that future courts should exercise extreme wariness when recognizing any torts other than Blackstone's primary three offenses (violation of safe conducts, infringement of the rights of ambassadors, and piracy) (Sosa v. Alvarez-Machain et al., 2004). However, the *Sosa* court ultimately concluded that courts do nonetheless maintain some degree of discretion to recognize causes of action beyond Blackstone's primary three offenses. The *Sosa* court

[10] Legal scholars are uncertain why ATS litigation fell out of favor in the 1800 and 1900s. Some speculate that the lack of legislative history created uncertainty as to its application, dissuading potential plaintiffs from invoking jurisdiction using the ATS. (Lee, 2015) It's also possible that the evolution of the field of international law provided additional incentives for plaintiffs to invoke the ATS in the 1980s, effectively "breath[ing] new life into the ATS." ("Clarifying Kiobel's "Touch and Concern" Test," 2017)

established a framework through which the court could recognize international causes of action arising from international law. First, a claim needed to be based on a violation of international legal norms that was "specific, universal, and obligatory," and second, courts needed to determine if the case represented an "appropriate" exercise of judicial discretion (Sosa v. Alvarez-Machain et al., 2004, p. 656). Though this standard limited the number of actionable claims plaintiffs could bring using the ATS, the widespread use of the ATS largely continued "unabated" after *Sosa* (Bellinger, 2009).

In 2013, nine years after deciding *Sosa*, the Supreme Court accepted review of *Kiobel v. Royal Dutch Petroleum Co.* This case was filed against Dutch, British, and Nigerian oil companies. A group of Nigerian nationals claimed that these foreign companies were responsible under the Law of Nations for aiding and abetting human rights abuses (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 113-14). In an 8-1 decision authored by Chief Justice Roberts, the Supreme Court dismissed the case. While ATS jurisprudence initially dealt predominantly with extraterritorial claims, the court in *Kiobel* significantly limited the scope of extraterritorial claims by imposing a requirement that a claim "touch and concern the territory of the United States." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 124) The *Kiobel* court further established precedent that the ATS must be read with a "presumption against extraterritoriality." This presumption is derived from the case of *Morrison v. National Australia Bank Ltd*. In *Morrison*, the Supreme Court held that "Congress ordinarily legislates with respect to domestic, not foreign matters" and that extraterritorial scope requires a clear expression of Congress' "affirmative intention" for the statute to be applied in this way (Morrison v. National Australia Bank Ltd., 2010, p. 255). The *Kiobel* Court held that the presumption applies in the case of the ATS because they did not see any indication in the history or text of the ATS that the First Congress

affirmatively intended for the ATS to apply extraterritorially. The *Kiobel* decision prevents courts from applying the statute's jurisdiction to activities occurring primarily outside the United States absent strong domestic activity that touches and concerns the US.

The Court further constructed barriers to extraterritorial application in *Nestlé USA, Inc. v. Doe*. In the case, formerly trafficked child slaves from Mali filed suit against several US companies, including Nestlé. The plaintiffs alleged that Nestlé had aided and abetted their enslavement by providing technical and financial resources to the farms. In an opinion written by Justice Thomas, the court held that general corporate presence in the US was not a sufficient nexus to necessitate activation of the statute (Nestlé USA, Inc. v. Doe, 2021, p. 1943). Justice Thomas also questioned the validity of a cause of action beyond the original Blackstone three ("violation of safe conducts, infringement of the rights of ambassadors, and piracy"). He argued that any causes of action beyond these three would "invariably give rise to foreign-policy concerns." (Nestlé USA, Inc. v. Doe, 2021, p. 1941) This framework shut the door to almost all avenues for future litigation, signaling the near extinction of the ATS.

Many commentators believed that *Nestlé* permanently foreclosed litigation under the ATS. However, in July 2023, the Ninth Circuit held that Chinese practitioners of the Falun Gong religious movement could go forward with their suit against Cisco Systems. The plaintiffs alleged that Cisco Systems had designed and built a surveillance system for the People's Republic of China which aided and abetted their torture, cruel inhuman and degrading treatment, forced labor, prolonged arbitrary detention, crimes against humanity, extrajudicial killing, and forced disappearance (Doe v. Cisco Systems, 2023, p. 721). On the question of extraterritoriality, the Court held that Cisco Systems had "acted with knowledge of the likelihood of the alleged violations of international law and with the purpose of facilitating them" while designing,

developing, optimizing, and manufacturing hardware for the surveillance system (Doe v. Cisco Systems, 2023, p. 749). Because these actions occurred within the US, the Court held that these allegations "well exceeded 'mere corporate presence'" under *Kiobel* or "simple corporate oversight and direction" under *Nestlé* (Doe v. Cisco Systems, 2023, p. 768). Thus, the presumption against extraterritoriality had been overcome, as domestic conduct was enough to constitute the *actus reus* of aiding and abetting (Doe v. Cisco Systems, 2023, p. 766). On the question of the cause of action, the majority held that aiding and abetting liability met the two-part test laid out in *Sosa*, even as it was narrowed in *Nestlé*. First, the Court held that aiding and abetting liability is generally accepted and specifically defined in customary international law (Doe v. Cisco Systems, 2023, p. 724). Second, the Court held that there were no "prudential" concerns about foreign policy that would trigger the principal foreign policy concern in *Nestlé*.

The decision in *Cisco Systems* is exciting for the future of ATS litigation, as it signals the willingness of certain courts to proceed with certain claims under the ATS, even in the face of *Kiobel* and *Nestlé*. However, the future of the ATS remains uncertain and precarious. The barriers against extraterritoriality and new causes of action are substantial, especially in the eyes of the current Supreme Court. Overcoming them has proven no small feat. Still, there is potential for legal innovation within ATS jurisprudence after *Cisco Systems*, and the hope for legal and statutory reform remains.

The history and context of accessory liability in US jurisprudence provides the most potential to facilitate this innovation. First, accessory liability provides a pathway to alternative legal standards that could effectively reform current doctrinal discrepancies. The history of aiding and abetting in the US provides a compelling rebuttal to the presumption against extraterritoriality and demonstrates the need for expansive causes of action under the ATS.

Second, a growing consensus in favor of a corporate accessory liability standard has recently garnered significant political momentum, thereby setting the scene for potential policy reform. Finally, even without substantial reform, *Cisco Systems* provides a potential blueprint whereby accessory liability can fit through the "narrow space the [*Nestlé*] Court has left for ATS actions." (Dodge, 2013).

Part II: *Cisco Systems*: Aiding and Abetting Liability in the Post-Nestlé World

Though scholarship on the state of ATS claims after the decision in *Cisco Systems* is incredibly limited, scholars do generally agree that aiding and abetting liability poses the next major question under ATS jurisprudence (Steinhardt, 2019). *Cisco Systems* is demonstrative of this trend, illustrating judicial approval for arguments surrounding accessory liability, even post-*Nestlé*. The human rights community largely heralded *Cisco Systems* as an unexpected triumph for the ATS and a signal of its continued endurance (Dodge, 2023). Yet little has been said about the role that the *Cisco Systems* decision plays within the larger ATS body of jurisprudence. On one hand, the *Cisco Systems* decision fits through the extraordinarily narrow space left by the *Nestlé* decision. It demonstrates the potential of accessory liability to dodge Justice Thomas' concerns about extraterritoriality and assuage fears about international retaliation. But the decision also demonstrates the limitations of the *Nestlé* framework and illustrates the necessity of legal or policy reform. Below, I briefly address the history of accessory liability in US jurisprudence, before situating the *Cisco Systems* decision within the larger context of ATS extraterritoriality and justiciability.

In adjudicating federal aiding and abetting claims, "[c]ourts have a wealth of history, tradition, and precedent at their disposal." (Mamolea, 2011) Before *Cisco Systems*, at least three other circuits had affirmed the viability of accessory liability under the ATS (Khulumani v.

Barclay National Bank Ltd., 2007; Presbyterian Church v. Talisman Energy, 2009; Aziz v. Alcolac, Inc., 2011; Romero v. Drummond Co., 2008). No court that considered aiding and abetting liability under the ATS has held otherwise, including, notably, the Supreme Court. Beyond this, scholars have recently realized that "[t]he aiding and abetting of international law violations is realistically a more common allegation against domestic corporations involved in global trade." (Petch, 2022)

These claims are grounded in the rich history of accessory liability throughout US federal law. In fact, courts, legal scholars, and political figures have long understood aiding and abetting liability to be an inherent component of the Law of Nations. For example, in 1793, George Washington made this point in his third Neutrality Proclamation, stating that "private citizens' aiding and abetting of hostilities that breached neutrality constituted [a] Law of Nations violation." (Brief for Professors of Legal History, 2021, p. 21) And in 1795, in *Talbot v. Janson*, the Supreme Court confirmed that claims of aiding and abetting in the capture of a ship constituted violations of the Law of Nations (Brief for Professors of Legal History, 2021, p. 24). Abundant evidence makes clear that the framers of the ATS were aware of these principles of accessory liability and intended for this liability to be cognizable under the ATS (Doe v. Exxon Mobil Corp., 2011, p. 29). Common law reflected this trend at the time the ATS was drafted, as aiders and abettors were "principals in the second degree in the criminal context." (Brief for International Law Scholars, Former Diplomats, And Practitioners, 2021)[11] Courts at the time of the framing of the ATS recognized this form of liability under the Law of Nations for those who

[11] The Brief for International Law Scholars, Former Diplomats, And Practitioners cites William Blackstone, Commentaries On The Laws Of England 34-35 (1769) which discusses principals and accessories at length.

"aid[] or abet[] hostilities forbidden by [a] foreign country," and indicated that these aiders and abettors implicated safe harbor norms (Henfield's Case, 1793).

Given the centrality of historical analysis to legal reasoning in recent ATS jurisprudence, this historical evidence is critical to the future of aiding and abetting liability. Though understandable given the wealth of evidence established by previous circuits on this issue, this is one place where the *Cisco Systems* opinion is notably deficient. In *Cisco Systems*, the 9th Circuit looked directly to the two-part Sosa framework to establish a new cause of action under the ATS. However, as many ATS scholars have indicated in the wake of *Nestlé* and *Kiobel*, historical reasoning remains a vital, central component of ATS jurisprudence (Giannini, 2022). Future legal arguments should not forgo the opportunity to emphasize that principles of accessory liability are central not only to the body of common law that informs the ATS, but also to the very focus of the ATS itself.

The next substantial obstacle that accessory liability must overcome is the presumption against extraterritoriality. For accessory liability to overcome this presumption under *Nestlé*, it "must establish that 'the conduct relevant to the statute's focus occurred in the United States.'" (Nestlé USA, Inc. v. Doe, 2021, p. 2082) On this issue, *Cisco Systems* established that the *actus reus*[12] of substantially affecting the international law violations of the Chinese Community Party had occurred domestically. The Court confirmed that because Cisco Systems designed, developed, and optimized important aspects of the surveillance system in California, the "essential, direct, and substantial" aiding and abetting occurred within the US.

[12] Here, the court held that the *actus reus* of "aiding and abetting liability requires assistance to the principal with substantial effect on an international law violation." In other words, aiding and abetting liability had been reached because the assistance provided to the Party and to the Chinese Public Security had "substantial effects on those entities' violations of international law." (Doe v. Cisco Systems, 2023, p. 703)

Though the actions of Cisco Systems did fit through the narrow space left by the *Nestlé* decision, the decision also illustrates the unworkability of the *Nestlé* standard. The *Nestlé* precedent requires courts to isolate the substantive and procedural elements of an ATS claim and adjudicate them separately. But doing so limited the ability of the Ninth Circuit to fully consider the national interests at stake in the case. Given the substantial history of aiding and abetting liability across federal law, even the mere presence of the Cisco Systems corporation on US soil should have been enough to trigger substantial national interests. However, the Ninth Circuit was not able to use the substance of these safe harbor concerns to justify the procedural reach of the statute. This separation between procedure and substance is unworkable, particularly in cases of accessory liability, where the geographic jurisdiction of the activity in question is amorphous. In his concurrence in *Kiobel*, Justice Breyer proposed an alternative standard for considering the presumption against extraterritoriality in ATS cases. This standard would consider US national interests in hearing a case and weigh these concerns against the procedural scope of the case, justifying extraterritoriality with the gravity of the interests at stake. In Part III, I argue that this standard is most appropriate in cases of accessory liability, and I consider both legal and policy reform to implement this framework.

Next, the decision in *Cisco Systems* looks to modern interpretations of accessory liability as a "specific, universal and obligatory" norm under international law. This analysis occurs in accordance with the first step of the *Sosa* framework. A variety of sources bolster the claim that aiding and abetting liability is grounded in customary international law. From the Nuremberg Charter, to the International Criminal Tribunal for the former Yugoslavia ("ICTY"), to state practice backed by opinio juris, international jurisprudence widely supports accessory liability under customary international law (Article 6 Agreement for the Prosecution and Punishment of

the Major War Criminals of the European Axis, 1945; Statute of the International 15 Criminal Tribunal for the Former Yugoslavi, 1993). Customary international law is also reflected in numerous multilateral treaties (Convention on the Prevention and Punishment of the Crime of Genocide art. 3, 1948; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 6, 1956). This understanding is pursuant to a universal recognition that the "contributions of those who do not directly perpetrate a crime are often vital in its commission and evoke the same opprobrium as the conduct of the principal perpetrators." (Brief for International Law Scholars, 2021, p. 17)[13] These arguments substantiate those set forth in *Cisco Systems*. There is no shortage of international jurisprudence, found in both treaty and customary international law, that supports the recognition of a cause of action for accessory liability.

The *Cisco Systems* decision, along with the rich history of accessory liability, effectively rebuts Justice Thomas' concerns in *Nestlé* as to the applicability of modern causes of action. As Justice Sotomayor argued in her concurrence to *Nestlé*, these concerns "contravene both this Court's express holding in *Sosa* and the text and history of the ATS." (Nestlé USA, Inc. v. Doe, 2021, p. 1942). First, the recognition of aiding and abetting liability is sufficiently grounded in both historical and contemporary jurisprudence. And secondly, there are no prudential reasons to bar accessory liability due to either "foreign policy" or "separation of powers" concerns (Nestlé USA, Inc. v. Doe, 2021, p. 1941). The Court outlines several arguments to this effect in *Cisco Systems*. First, accomplice liability, "is much more likely to be used to address the transgressions of nongovernmental actors than the actions of foreign governments themselves," thereby

[13] The Brief for International Law Scholars cites the case Prosecutor v. Tadiæ. The case sets out that "the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question." (Prosecutor v. Tadiæ, 2009)

mitigating the foreign policy concerns, as suits against nongovernmental actors do not raise the same international comity or sovereignty issues (Doe v. Cisco Systems, 2023, p. 731). Further, the *Cisco Systems* Court found compelling that "no foreign government or Executive Branch agency has submitted an amicus brief, declaration, or letter objecting to this lawsuit." (Doe v. Cisco Systems, 2023, p. 732).

The opinions of *amici* on this topic provide other compelling arguments that bolster these claims. For one, preventing corporations from human rights violations has long been a core value of US foreign policy (Brief of Former Government Officials, 2021, p. 13). Further, doctrines of accessory liability are "well-established under international law," and US allies have entertained similar litigation against multinational corporate actors (Brief of Foreign Lawyers, 2021). Finally, safe harbor norms once again implicate historic and contemporary obligations to the Law of Nations. The Law of Nations obligates sovereign states to provide mechanisms of accountability against those who perpetuate abuses abroad and yet seek refuge within their territory. For all these reasons, the Supreme Court's current standard is unworkably strict and out of step with the reality of the statute's history. Legal or statutory reform is necessary to remedy these concerns and institute a workable framework for adjudicating ATS claims.

Though the arguments leveraged in *Cisco Systems* are tailored to the unique foreign policy and doctrinal considerations of that case, they provide a useful roadmap for future innovation under the ATS and highlight discrepancies in the current standards. Claims of accessory liability provide opportunities for future litigators to test the boundaries of the ATS, leverage a more accurate historical record of the legacy of the ATS, and advocate for legal doctrine that aligns with the modern Law of Nations.

Methodology

Scholars have long recognized that the ATS is "steeped in history." (Giannini, 2022) Because the ATS was enacted by the First Congress in 1789, history is crucial to ATS jurisprudence. The Court's ATS decisions have largely hinged on very specific readings of history and eighteenth-century historical paradigms. These historical philosophies shed critical light on the purpose of the ATS, its procedural scope, and its substantive reach. Because of this, the Supreme Court has traditionally relied heavily on thorough historical analysis to formulate ATS legal doctrine and application. In this thesis, I argue that the current legal framework for adjudicating ATS claims is incompatible with the history, tradition, and context of the statute itself. For restoration of the ATS to occur, I argue that this framework must be reformed. To make this argument, I analyze a body of primary sources regarding accessory liability that illustrates how the themes of ATS litigation were understood by the Founding Generation. Leveraging the historical paradigms advanced within these primary sources, I argue for alternative legal standards that would bring ATS jurisprudence back in line with its history and context.

On the first subject, the presumption against extraterritoriality, I look to various sources regarding jurisdiction, territoriality, and the Law of Nations, as it was understood at the time the ATS was constructed. In particular, I analyze the work of international legal scholars William Blackstone, Matthew Hale, Emmerich de Vattel, and Edward Coke, who greatly influenced legal thought on accessory liability, the Law of Nations, and extraterritorial sovereignty during the late 1700s. I then turn to primary sources on piracy law, which further substantiate early American paradigms on extraterritoriality, jurisdiction, and accessory liability in the context of the ATS. These historical sources draw out an alternative legal paradigm for understanding territoriality

and confirm a broad jurisdictional scope for ATS liability. I also argue that this alternative paradigm is consistent with early applications of the ATS. To this end, I analyze ATS court opinions across the evolution of ATS jurisprudence. Together, these sources illuminate discrepancies within the current legal framework for adjudicating ATS cases and support the implementation of a new standard.

I use a similar body of primary sources and methodology when considering ATS causes of action. To resolve questions about ATS causes of action, I analyze primary sources that illustrate Congressional intentions for both modern and historical applications of ATS liability. To do so, I analyze Congressional records, legislative history for statutes such as the TVPA, as well as recently discovered materials from George Washington's presidency which demonstrate the motivations of the Founding Generation when constructing the ATS. I also contextualize these concerns within a larger body of history by analyzing Congressional responses to early international diplomatic disputes in the late 1700s and early 1800s. Finally, I substantiate this history with the legal paradigms established by Emmerich de Vattel in the early 1700s, which were foundational in the Founding Generation's conception of the Law of Nations. I also demonstrate the consistency of this alternative paradigm by analyzing primary sources related to the contemporary Law of Nations. In particular, I look to several *amicus curiae* briefs submitted in support of plaintiffs in various contemporary ATS cases, which establish both national and international conceptions of the Law of Nations. Several of these briefs were submitted by foreign governments and illustrate international opinions on ATS litigation. Throughout this section, I also chart the evolution of this legal paradigm throughout ATS jurisprudence by analyzing majority, concurring, and dissenting opinions authored by various Justices at the Supreme Court and lower court level.

Part III: Analyzing The Presumption Against Extraterritoriality

The court in *Nestlé* imposed a restrictive interpretation of the extraterritorial application of the ATS. It held that the ATS does not "evince a 'clear indication of extraterritoriality.'" (Nestlé USA, Inc. v. Doe, 2021, p. 1933) Because of this, *Nestlé* established a new test. The new standard required plaintiffs to establish that "the conduct relevant to the statute's focus occurred in the United States." (Nestlé USA, Inc. v. Doe, 2021, p. 1933; RJR Nabisco, Inc. v. European Cmty., 2016) By applying this new standard, the Court held that ATS jurisdiction did not apply. This ruling occurred despite the presence of the corporate Nestlé headquarters in territory of the United States, and despite the numerous business decisions that occurred within the US. Instead, the court held that Nestlé could escape the jurisdictional focus of the statute because the alleged slavery itself happened abroad (Nestlé USA, Inc. v. Doe, 2021, p. 1935).

In *Nestlé*, the Court applied the "focus" standard to a question of accessory liability; this application is unworkable because it prevents courts from considering policy when ruling on questions of jurisdiction. This latter concern is demonstrated at length in the *Cisco Systems* decision. When ruling on the question of extraterritorial jurisdiction, the Ninth Circuit looked exclusively to the location of the conduct in question, without contemplating the specific US national interests implicated by the case. Had the court found less evidence of domestic conduct, it would have overturned the case on the principle of procedure alone, without ever contemplating the significant US interests at stake. This separation, required by the focus standard, is unworkably strict because it hamstrings courts from considering the true implications of the cases in front of them. This is especially true in cases of accessory liability, where the territorial location of the action itself is complex and amorphous. As such, claims of accessory liability necessitate a departure from the *Nestlé* focus standard to properly interpret the

extraterritorial application of the ATS. A different standard, one that marries the substantive implications of accessory *mens rea* with the jurisdictional scope of the statute, is appropriate in these cases.

Though the *Nestlé* court centers conduct within the "focus" standard, this standard is inconsistent with the history of accessory liability. For the *Nestlé* Court, the tortious action itself is the only relevant factor for the question of territoriality and jurisdiction, regardless of the substance of the larger activity or the policy implications of the tort itself. But this conduct-based reading is inconsistent with the history of accessory liability. Instead of the conduct-based approach employed by the *Nestlé* Court, international legal scholars of the early 1600s grounded theories of accessory liability in "concepts of duty." (Lovejoy, 2009) For example, oft-cited diplomat and theologian Hugo Grotius considered the duties and obligations underwriting accessory liability. Grotius placed more blame and responsibility on the abettor who had the authority and position to "compel," "urge" or facilitate a crime than on the principal actor (Grotius, 1625). These themes of duty, obligations, responsibility, and derivative liability also motivated English common law theorists, including William Blackstone,[14] Matthew Hale,[15] and Edward Coke.[16] For each, accessory liability could be "punished consistent with principal liability" because of the unique duty that accessories possessed to prevent harm (Lovejoy, 2009, p. 252). Thus, the contextual understanding of a crime was essential to understanding and

[14] William Blackstone was a prominent American legal scholar with "the most profound influence on shaping the legal thought of the Revolutionary and Founding generations." (Bader, 1994)

[15] Matthew Hale, was a "prolific writer" who produced influential works that formed the basis of both English and American legal scholarship and jurisprudence. His treatises were cited in early US cases including United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807); United States v. Smith, 27 F.Cas. 1192, 1218 (C.C.D.N.Y.1806); Mitchell v. Warner, 5 Conn. 497 (1825); Jackson v. Fitzsimmons, 10 Wend. 9 (N.Y. 1832).

[16] Edward Coke was a legal scholar with immense influence on the first generation of American lawyers. His work was consistently cited throughout early American legal jurisprudence (Mullet, 1932).

assessing liability. Rather than focusing solely on the conduct of the principal actor, these early theorists looked to comprehend the duties and obligations motivating each case and assigned liability accordingly.

As such, the extraterritorial application of accessory liability was fundamental to early understandings of a nation's obligations under the Law of Nations. Emmerich de Vattel, another preeminent Law of Nations scholar, constructed Law of Nations obligations based on the responsibility of attribution. Attribution included wrongs which were (1) committed by a nation's subjects wherever they occurred; (2) committed on national territory; and (3) where a violator took safe harbor within national territory (Vattel, 1759). The question of safe harbor was especially relevant in cases of accessory liability, where the violator might shelter thousands of miles away from the abuse itself. Still, the Law of Nations held considerable interests in bringing these aiders and abettors to justice, regardless of where they currently lived. Vattel understood that, in cases of accessory liability, "arenas for redress overlapped," so it was crucial that liability extend past the jurisdictional boundaries of the United States (Brief of Professors of Legal History, 2021). For Vattel, this logic was motivated by the substantive policy obligations that sovereigns held to each other: "in short, the safety of the state, and that of human society" required that sovereigns pursue accountability for the actions of their subjects wherever they occurred (Vattel, 1759, p. 72).

Because aiding and abetting liability played such a central role in early theories of international and common law, this history challenges the conduct-based centrality of the "focus" standard, as well as its tendency to divorce the procedural and substantive elements of ATS liability. Instead, scholars like Vattel and Blackstone understood accessory liability to use jurisdiction *as a tool* for fulfilling certain policy-grounded obligations under the Law of Nations.

The procedure of extraterritorial attribution was an essential component of substantive responsibilities under the Law of Nations, especially in the context of accessory liability.

The relevance of this history of accessory liability is even more compelling in the context of piracy law in Early Modern England and Colonial America. Because the ATS was largely conjured to bring justice to the victims of piracy, this history provides a compelling rebuttal to the focus standard, and further justifies extraterritorial dimensions of accessory liability cases. Accessory liability played a central role within piracy jurisprudence. Though piracy cases were held in a plethora of venues, including admiralty jurisdiction, common jurisdiction, and specially convened commissions, each of these venues consistently affirmed aiding and abetting liability (Lovejoy, 2009, p. 255). As early as 1569, Queen Elizabeth I issued proclamations strengthening aiding and abetting liability for pirates (A Proclamation Against the Maintenaunce of Pirates, 1569). A century later, in Colonial America, similar concerns persisted: in a 1690 case in Massachusetts, Benjamin Blackledge was held accountable for aiding a pirate's escape and in 1724, the Court of Admiralty tried several defendants for "aiding and abetting piracy" for the seizure of another ship (Jameson, 1923). In 1790, a year after the ATS was officially passed, Congress passed another law directly criminalizing aiding and abetting piracy and establishing jurisdiction over anyone who assisted pirates either "on land or the seas." (Jameson, 1923; § 6, 1 Stat. 113, 1790). Crucially, these laws deemed actions of aiding and abetting as violations of the Law of Nations. In each of these examples, accessory liability was not constrained by jurisdictional limits or territorial constraints. Substantive obligations to the general pursuit against pirates, viewed as the "enemy of all mankind," required sovereign nations to actively pursue those who aided and abetted pirates, regardless of the territory that they inhabited. Like Blackstone and Vattel's approach to accessory liability, the focus of these concerns was not the

conduct of piracy itself, but rather the substantive responsibilities and obligations that sovereign nations had *to each other* to pursue accountability against pirates and those who aided and abetted them.

In the *Nestlé* opinion, Justice Thomas separates the substantive grasp of the ATS from the procedural components of jurisdiction. But the history of accessory liability makes clear that these two cannot be so easily parsed. As Justice Breyer argues in his concurrence to *Kiobel*, "Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133) As such, Breyer proposes a standard that marries procedure and substance: giving weight to the views of the Executive Branch, and limiting principles such as exhaustion, *forum non conveniens*, and comity, the ATS would provide jurisdiction where "distinct American interests are at issue." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133) This standard is consistent with the history of accessory liability and is the appropriate standard to consider these claims. Doing so would allow the courts to carefully consider jurisdiction in the same breath as foreign policy interests and obligations, and holistically weigh these concerns. It would also allow courts to weigh foreign policy responsibilities on a case-by-case basis, rather than dismissing important interests out of hand because of jurisdictional obstacles. In the next section, I demonstrate how this standard could be applied to cases of accessory liability and consider the implications of this legal reform.

A. A New Legal Standard

Though the *Nestlé* majority used the focus standard to conclude that "mere corporate presence" did not constitute a strong enough force to "displace" the presumption against extraterritoriality, this standard is inappropriate. Regardless of the substantive obligations and

interests that would justify a claim under the ATS in this case,[17] the *Nestlé* majority declined to consider substance and procedure holistically. This prevented the court from fully considering the interests at stake in the case and from fully appreciating the potential for substantive policy interests to justify procedural concerns. However, Justice Breyer argued that substance and procedure should be understood collectively: "we should treat this Nation's interest in not becoming a safe harbor…as an important *jurisdiction related interest justifying application* of the ATS in light of the statute's basic purposes." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133)

Breyer's close reading of ATS jurisdiction and substance is by no means unique: in fact, lower courts have considered jurisdiction in a similar way throughout the history of ATS caselaw. As such, by explicitly delineating substantive and jurisdictional elements, the holding in *Nestlé* is in fundamental conflict with previous applications of the ATS. In *Filártiga*, the torture itself was inflicted in Paraguay, and neither the plaintiff nor defendant were American nationals. However, the Court upheld jurisdiction because "the defendant's alleged conduct violated a well-established international law norm, and the suit vindicated our Nation's interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133)

There, the court weighed the substance of national policy interests to justify the scope of jurisdiction. Rather than defaulting to the type of one-size-fits-all jurisdictional model later adopted in *Nestlé*, the Court dug into the policy interests at stake in the case at bar. Similarly, in

[17] For example, amici cited the responsibilities of the US to demonstrate a shared international mission to bring justice and accountability to violators of human rights, to condemn gross abuses of international norms, and set standards for corporate accountability (Brief Of Amici Curiae Oxfam America And Professors Of Economics, 2021, p. 6).

Marcos, the plaintiffs were nationals of the Philippines, the defendant was a Philippine national, and the alleged wrongful act took place abroad. However, the defendant had taken refuge in Hawaii, and official torture was determined as a *jus cogens* norm. The Court recognized that "[t]o subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being." (In re Estate of Ferdinand Marcos Human Rights, 1994, p. 1475) Like in *Filártiga*, even though the torture itself had occurred abroad, norms of safe harbor and the international condemnation of torture were together sufficient to implicate US interests in hearing the case, and these norms ultimately justified the scope of jurisdiction.

Breyer's alternative standard starts with a careful examination of the statute's basic purposes. Here, fidelity to the statutory intent is critical to the relationship between jurisdiction and substance. The original language and purpose of the statute provides guidance as to the appropriate extraterritorial scope of jurisdiction. As Justice Breyer noted, it is important that extraterritorial jurisdiction have some limiting principle so that the US does not "[pretend] to be the custos morum of the whole world." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133; United States v. La Jeune Eugenie, 1822, p. 847) In his standard, these limiting principles start at the text and intent of the statute itself.

Because the ATS signals an explicit international application, extraterritorial jurisdiction in a case of accessory liability would be appropriate. The first clue as to the purpose of the ATS is the language of the statute itself, which refers explicitly to "alien[s]," "treat[ies]," and "the Law of Nations." (Alien Tort Statute, 1789) The invocation of these themes rebuts the central logic of the presumption against extraterritoriality, that "Congress ordinarily legislates with respect to domestic, not foreign, matters." Here, the explicitly international language of the ATS

makes clear that it *was* enacted with "foreign matters" in mind (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133; Morrison v. National Australia Bank Ltd., 2010). In *Sosa*, the Supreme Court read the ATS's purpose to address "violations of the Law of Nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs." (Sosa v. Alvarez-Machain et al., 2004, p. 715) Thus, unlike the US Securities legislation in *Morrison*, where Congress had made no "affirmative intention" for extraterritorial application, the very language of the ATS rebuts the presumption against extraterritoriality. Judge Posner of the Seventh Circuit made a similar argument, pointing to the "ample tort and criminal remedies" that already applied domestically within the country (Flomo v. Firestone Natural Rubber Co, 2011, p. 1025). Denying extraterritorial application would render the statute "superfluous" given the presence of other tort remedies already in place. Further, ATS scholars have found it relevant that, though the other jurisdictional instruments in the Judiciary Act specifically contained language limiting their domestic application, the ATS contains no such language. Instead, as Justice Breyer notes, the ATS has long been understood to apply to fundamentally international matters and was enacted with this very purpose.

Secondly, Breyer asks whether "distinct American interests are at issue." Here, the history of safe harbor norms justifies the scope of extraterritorial jurisdiction in cases of accessory liability. Safe harbor norms are intrinsically ingrained within the definition of the Law of Nations, demonstrating a fundamental US interest in these types of cases.[18] Safe harbor norms provide evidence that the mere existence of torturers, corporations, or other violators of the Law

[18] The territorial obligation also required the sovereign to refrain from providing safe harbor to violators of the Law of Nations: "by granting protection to an offender, [the nation] may become a party . . . [to violations] committed abroad, either by its own subjects, or by foreigners, who afterwards take refuge in its territories." (Rutherford, 1832, bk. 2, ch.9 § 12).

of Nations on US soil substantially "touch and concern" the interests of the US. In *Kiobel*, Justice Breyer notes that "just as a nation that harbored pirates provoked the concern of other nations in past centuries, so harboring "common enemies of all mankind" provokes similar concerns today." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 131) These concerns are substantiated by the history of concerns surrounding pirates, stretching back as far as Ancient Athens.

The vestiges of international norms regarding the safe harbor of pirates stretches back to Ancient Athens and Greece's struggle against piracy and are present in the early American colonies. The Athenian campaign against pirates was a necessarily international one: rather than fighting on their own basis, "every polis by the sea was vulnerable to the Athenians" if suspected of "sponsoring or harboring pirates." (Bradford and Bradford, 2007) In this way, the Athenians instituted and maintained norms that prohibited any polis from aiding or abetting pirates. This spirit was also present in the early American colonies. For example, in the 1690s, Pennsylvania's lieutenant governor and New York's Governor Benjamin Fletcher were both accused of harboring pirates and were targeted with legal action (Risjord, 1981). Years later, in 1882, the Governor of Connecticut was similarly accused (Yonge, 1882). Because safe harbor norms united the policy interests of those across the world, the US had a substantial economic and moral interest in charging individuals within their territory with aiding and abetting pirates. These international norms were grounded in domestic interests: the US carried substantial interests (and duties) to the "commercial world" and the safeguarding of property rights on the high seas (Rubin, 1987). Unlicensed violence on the high seas jeopardized these economic interests, and it threatened systems of transnational capitalism that benefited both the US and other nations. Because of these mutual policy interests, the US also shared international

obligations and duties to its safe harbor norms. Under Vattel, the Law of Nations required sovereign nations to satisfy certain obligations by seeking redress, or risk "escalating to full international conflict." (Brief for International Law Scholars, 2021, p. 9) Tolerating any breach of these obligations was "viewed as an attack on the civilized world" and could pose serious diplomatic consequences (Brief for International Law Scholars, 2021, p. 10).

Thus, these safe harbor norms vindicate an extraterritorial application of the ATS. The framers of the ATS would have understood the international concerns of harboring pirates, even pirates that did not reside within or derive nationality from the United States. As Justice Breyer notes, "just as a nation that harbored pirates provoked the concern of other nations in past centuries, so harboring "common enemies of all mankind" provokes similar concerns today." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 131) In *Jesner v. Arab Bank, PLC*, the Supreme Court noted that the ATS was constructed as a signal to other nations as to the US' commitment to the common goals of the Law of Nations. According to the *Jesner* Court, the ATS "was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable." (Jesner v. Arab Bank, PLC, 2018, p. 1389) Indeed, the ATS has been used to uphold these norms of safe harbor in cases like *Filártiga*, *Sosa*, and *Marcos*. By understanding the torturer to fit within the definition of the "modern pirate," various courts used the ATS to "[vindicate] our Nation's interest in not providing a safe harbor." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 135)

Safe harbor norms are well substantiated by the history of both ancient and contemporary wars against pirates. They unite the sovereign interests of different nations under a common legal goal and provide a mechanism through which the Law of Nations can be materially

substantiated. Thus, because the ATS was shaped around the prosecution of pirates, safe harbor norms are an important component of the extraterritorial application of the ATS, and this history can be leveraged to justify extended jurisdictional scope in these cases. The current "focus" standard insists on a separation between substance and procedure, effectively isolating the policy implications of transnational litigation from the jurisdiction needed to bring these claims. But this separation prevents the consideration of safe harbor norms, which are essential components of both the Law of Nations and the history of ATS jurisprudence. Justice Breyer's alternative standard would effectively 'unlock' arguments regarding safe harbor concerns, allowing courts to properly weigh these interests when determining ATS jurisdiction. Especially given the amorphous jurisdiction of accessory liability claims, these considerations are crucial.

Part IV: Analyzing Causes of Action

In *Nestlé*, the Supreme Court did not merely dismantle the procedural elements of the ATS by divorcing them from the policy implications of the statute. Instead, the Court also transformed the substantive scope of the ATS, overruling *Sosa* in all but name. To justify effectively limiting the causes of action under the ATS to the three historical torts recognized by Blackstone ("violation of safe conducts, infringement of the rights of ambassadors, and piracy"), Justice Thomas argued that "creating a cause of action to enforce international law beyond three historical torts invariably gives rise to foreign policy concerns." (Nestlé USA, Inc. v. Doe, 2021, p. 1940) This reading of the ATS contradicts the ruling in *Sosa*, which allowed for evolving understandings of international law to create new causes of action, as long as those causes of action were sufficiently "specific, universal, and obligatory." (Sosa v. Alvarez-Machain et al., 2004, p. 732) Nothing in *Sosa* suggested that the ATS should be stuck in time at the moment of its creation, nor that it was meant to restrictively apply only to the three Blackstone concerns.

Because of this, the *Sosa* framework should remain the controlling standard for evaluating ATS claims. Justice Thomas' interpretation of the ATS leverages a reading of history that is deeply antithetical to the actual purpose of the ATS. His standard for ATS litigation is also fundamentally at odds with the goals of both historical and contemporary human rights regimes. Based on an alternative reading of the history of the ATS grounded in historical legal jurisprudence, legislative history, and primary documents, I propose a return to the two-part *Sosa* standard for adjudicating ATS causes of action. The history of accessory liability is particularly instructive here, as it demonstrates the foreign policy obligations for those who facilitate abuse. The *Cisco Systems* decision also demonstrates the necessity of this reform by illustrating the practical inconsistencies of Justice Thomas' argument.

A. Congressional Intent

In the majority opinion of *Nestlé*, Justice Thomas expressed concern about the stress of the ATS on the traditional separation of powers. He reasoned that because *Erie R. Co. v. Tompkins* "denied the existence of any federal 'general' common law," the federal judiciary should defer to Congressional authority when seeking to recognize a "damages remedy." (Nestlé USA, Inc. v. Doe, 2021, p. 1939) As such, a plurality of the Court held that federal courts could not use the ATS to recognize causes of action beyond the historical three identified by Blackstone.

The *Cisco Systems* decision contests the notion that only Blackstone's three historical causes of action are justiciable under the ATS. To do so, the *Cisco Systems* decision looks to the extensive history of accessory liability at common law, as well as the lack of any policy concerns stemming from this decision. The *Cisco Systems* decision is also explicit that it does not recognize Justice Thomas' standard as controlling precedent because the idea that "no new

causes of action may be judicially recognized has never gained the support of a majority of the Court." (Doe v. Cisco Systems, 2023, p. 712) Instead, they defer to the two-part test recognized in *Sosa*, which is "strict but not insuperable." (Doe v. Cisco Systems, 2023, p. 712)

Several strands of history and precedent support this argument. The *Sosa* standard remains the appropriate standard to adjudicate causes of action under the ATS and any other reading of the ATS is completely "unmoored from both history and precedent." (Nestlé USA, Inc. v. Doe, 2021, p. 2095) First, though Justice Thomas interprets *Erie* to compel deference to Congress, this reading neglects the reality of the *Erie* decision. The *Sosa* Court argued that *Erie* didn't disallow federal courts from recognizing new causes of actions because the "post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way." (Sosa v. Alvarez-Machain et al., 2004, p. 729) This argument is substantiated by cases like *Texas Industries, Inc. v. Radcliff Materials, Inc* which found "our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist." (Texas Industries, Inc. v. Radcliff Materials, Inc., 1981, p. 641) In light of this, the *Sosa* Court appropriately concluded that "it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." (Sosa v. Alvarez-Machain et al., 2004, p. 730) And even if *Erie* limits this possibility, as Justice Thomas contends, the context of federal common law two centuries ago is still dispositive. Prior to *Erie*, federal courts "routinely" applied international law as a form of common law, without the need for "authorization from the executive or legislative branches." (Stephens, 2004, p. 414) Eventually, *Erie* rejected this standard federal court practice. (Sosa v. Alvarez-Machain et al., 2004, p. 730) Thus, the First Congress, some 150 years before *Erie* was decided, would have operated under the assumption that federal courts could create

their own causes of action. It had no need to imbue this official authority within the language of the statute, as that authority would have seemed redundant given their contextual understanding of common law at the time. *Sosa* bases its argument on this understanding: "The First Congress… *assumed* that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction." (Sosa v. Alvarez-Machain et al., 2004, p. 730) The *Sosa* Court found it particularly unreasonable to assume that the First Congress would have expected a change in federal common law to affect the capacity of the ATS to "recognize enforceable international norms." (Sosa v. Alvarez-Machain et al., 2004, p. 730)

Because of this, the original intent of the framers of the ATS would not have limited the statute's scope to the three historical Blackstone causes of action. The *Jesner* Court held that "Congress' 'principal objective' in establishing federal jurisdiction over such torts "was to avoid foreign entanglements." (Jesner v. Arab Bank, PLC, 2018, p. 435) By ensuring the "availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen," the ATS sought to preserve US foreign relationships through judicial power. (Jesner v. Arab Bank, PLC, 2018, p. 435) This concern was born out the inability of the Articles of Confederation to "cause infractions of treaties, or of the Law of Nations to be punished," and inspired the First Congress to grant the federal judiciary with broad interpretative powers over interpreting and applying the Law of Nations (Sosa v. Alvarez-Machain et al., 2004, p. 716; Madison, 1893).[19]

These historical concerns run contrary to Justice Thomas' claims on two grounds. First, they demonstrate that the original purpose of the ATS would have necessitated a broad scope of

[19] As James Madison complained, "these articles [of confederation] contain no provision for the case of offenses against the Law of Nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." (Madison, 1893)

actions. The First Congress would not have understood the three Blackstone causes of action to be sufficient on their own to preserve the foreign relations interests outlined above. To do so, the ATS would have needed to be inherently flexible and capable of evolution. And secondly, this purpose undermines Thomas' argument that ATS cases "invariably gives rise to foreign-policy concerns." (Nestlé USA, Inc. v. Doe, 2021, p. 1938) In fact, the *Jesner* and *Sosa* Courts presented the opposite concern: ignoring the Law of Nations (and not invoking it) threatened international conflict. The First Congress worried that foreign nations would take "umbrage at the United States' refusal to provide redress to their citizens for international law torts committed by U. S. nationals within the United States." (Nestlé USA, Inc. v. Doe, 2021, p. 2097) Diplomatic retaliation for inaction motivated the First Congress to pass the ATS as a mechanism for their compliance with the Law of Nations.

This understanding of the ATS was leveraged successfully in the era of litigation immediately following *Filártiga*. In *Filártiga* itself, the court found persuasive evidence from the *The Paquete Habana*, holding that "traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into 'a settled rule of international law.'" (Filártiga v. Peña-Irala, 1980, p. 881) The *Filártiga* majority took this to mean that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." (Filártiga v. Peña-Irala, 1980, p. 881) Following this logic, the Court understood the "torturer" as having become "*hostis humani generis*, an enemy of all mankind" like the "pirate and slave trader before him." (Filártiga v. Peña-Irala, 1980, p. 881) By claiming that the cause of action of torture to have evolved and ripened into the Law of Nations, the *Filártiga* majority conceptualized the ATS as a flexible instrument intended to pursue the "fulfillment of the ageless dream to free all

people from brutal violence." (Filártiga v. Peña-Irala, 1980, p. 881) Naturally, the *Filártiga* court understood that this "ageless dream" required the causes of action to evolve and expand with modern international law. Following the water-shed moment in *Filártiga*, other federal courts took up a similar understanding of the cause of action under the statute. In a 1986 Southern District of California decision, *Guinto v Marcos* recognized that the "Law of Nations should be interpreted not as it was in 1789, but as it has evolved and exists among the nations of the world today." (Guinto v. Marcos, 1986, p. 279) In the 9th Circuit, *Doe I v. Unocal Corp* held that "[f]orced labor is a modern variant of slavery to which the Law of Nations attributes individual liability such that state action is not required." (Doe I v. Unocal Corp., 2002, p. 946) The emphasis on evolution and modern interpretations of international law affirms the purpose of the ATS: to apply to crimes that modern international law has agreed constitute the "most egregious violations of the personal security and dignity of a human being." (In re Estate of Ferdinand Marcos Human Rights, 1994, p. 1475)

The metaphor of "ripeness" used to explain the evolution of international norms in *Filártiga* is echoed in the Torture Victim Protection Act of 1991 (TVPA). The Committee Reports note that while the TVPA "establish[ed] an unambiguous and modern basis for a cause of action" to sue perpetrators of torture and extrajudicial killing, the ATS "has other important uses and should not be replaced." (H. R. Rep. No. 102–367, 1991, p. 3; S. Rep. No. 102–249, 1991, p. 4) Perhaps foreseeing the argument leveraged by Justice Gorsuch in his concurring opinion to *Nestlé,* the framers of the TVPA were very clear that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered." (H. R. Rep. No. 102–367, 1991, p. 4; S. Rep. No. 102–249, 1991, p. 5) Finally, the framers of the TVPA reflect the language used in *Filártiga* regarding the evolution of causes of action. They

assert that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." (H. R. Rep. No. 102–367, 1991, p. 4; S. Rep. No. 102–249, 1991, p. 5) This language confirms Congress' intent for the ATS to evolve over time, taking on new causes of action as international law develops.

As such, Justice Thomas' assertion about the stress of the ATS on the traditional separation of powers is ungrounded in history. Rather, the history of the ATS makes clear that both modern and historical Congresses took strides to ensure the doctrinal flexibility of the ATS and to allow for natural evolution in ATS jurisprudence. This interpretation is found in early ATS cases and is the appropriate reading to apply today. From Congressional responses to the Articles of Confederation, to the more recent Congressional history of the TVPA, the evolutionary nature of the ATS is clear. Thus, *Cisco System's* contestation of Justice Thomas' reasoning is substantiated by considerable history and precedent: *Sosa's* two-step test is the appropriate standard given the history of the ATS.

B. A Nation Among Nations

Aside from his concern about the intentions of Congress, Justice Thomas also argues that non-historical causes of action would "invariably" raise insurmountable foreign policy concerns. He argues that, aside from "the three historical torts likely on the mind of the First Congress," "there always is a sound reason" for courts to refuse to recognize actionable torts under the ATS. (Nestlé USA, Inc. v. Doe, 2021, p. 1942) This concern is echoed by critics of the ATS who worry that the statute would cause rifts within US foreign relations by inviting international litigation. This concern is ironic when considering the preoccupations of the Founding Generation: a survey of early American history makes clear that it was the exact opposite anxiety that motivated the construction of the ATS in the first place. In that context, it was inaction, not

over-action that was "understood as a potential source of foreign strife." (Giannini, 2022, p. 832) These dynamics are reflected in the modern international reaction to the ATS, as well as in contemporary understandings of global human rights regimes.

A consistent historical narrative rebuts Justice Thomas' concerns. Both the original and contemporary understandings of the ATS tell a vastly different story regarding the foreign implications of ATS litigation. The *Cisco Systems* decision overcame Justice Thomas' standard by demonstrating there was "no prudential reason to decline to recognize aiding or abetting liability" based on foreign relations concerns (Doe v. Cisco Systems, 2023, p. 731). However, this standard is unworkable from the outset and should not be considered. By requiring litigants to demonstrate that there is "no sound reason" to refuse their case, Justice Thomas' standard effectively closes "the courthouse doors" to the vast majority of future ATS cases (Nestlé USA, Inc. v. Doe, 2021, p. 1951). As Justice Sotomayor argues in her concurring opinion to *Nestlé*, Justice Thomas' standard "is a gross overreaction to a manageable (and largely hypothetical) problem." (Nestlé USA, Inc. v. Doe, 2021, p. 1951) This requirement is out of step with the definition and application of the Law of Nations, as well as the climate of both historical and contemporary foreign relations.

i. Defining the Law of Nations

The work of Emmerich de Vattel, the "leading international-law jurist of the Founding generation" is particularly instructive in clarifying how the Framing generation would have understood the purpose of the ATS (Giannini, 2022, p. 833). Vattel's theories rebut Justice Thomas' bold claim about the narrow purpose of the ATS: in Vattel's work, the US holds an obligation to other nations to provide redress for certain violations of the Law of Nations. For Vattel, inaction, and not action, threatened to jeopardize the US' position within international

legal diplomacy. In *The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns,* Vattel describes the Law of Nations as a structure of obligations enforced by "civilized nations." These obligations were specifically separated into three "arenas" — wrongs: (1) committed by their subjects wherever they occurred; (2) committed on their territory; and (3) where a violator took safe harbor within their territory (Vattel, 1759, bk. 2, ch. 6, § 77). In any of these instances, nations were "obligated to provide redress for the violations of private individuals and juridical entities, including both principal violators and their aiders and abettors." (Vattel, 1759, bk. 2, ch. 6, § 77) These obligations under the Law of Nations required nations to "mutually to respect" each other and for "justice and equity" to govern international relations (Vattel, 1759, bk. 2, ch. 6, § 71).

Critically, Vattel also laid out the consequences of noncompliance. If nations failed to uphold their obligations, Vattel feared that international relations would devolve into "nothing but one nation robbing another." (Vattel, 1759, bk. 2, ch. 6, § 72). Nations also had considerable positive incentives to comply. The commitment to uphold the rule of law allowed sovereign states to access the community of "civilized" nations. This cemented a state's reputation as "legitimate" and "worthy of international respect." (Brief of Professors of Legal History, 2021, p. 6) Nations accepted responsibility in the cases where their subjects, territory, or responsibilities under safe harbor norms were implicated. This responsibility extended extraterritorially[20] and encompassed those who aided and abetted" violations of the Law of Nations.[21] These theories of noncompliance provide a compelling rebuttal to Justice Thomas'

[20] Two notable cases explicitly applied these theories and "included aiders and abettors as well as the principal actors." (Breach of Neutrality, 1795; Henfield's Case, 1793).

[21] There is a plethora of evidence from early legal philosophy that supports this responsibility.Vattel identified the sovereign's responsibility to provide redress for its subjects violating Law of Nations by plundering, robbing, or killing on territory of other nations) (Vattel, 1759, bk. 2, ch. 6, §§ 75–76, 78) Blackstone noted that "where the individuals of any state violate" the Law of Nations it is the "duty of the government under which they live" to

concerns. For Vattel, closing the courthouse doors to violations of the Law of Nations would be extraordinarily dangerous because it would give "rise to foreign-policy concerns" just as "invariably" as leaving them open (Nestlé USA, Inc. v. Doe, 2021, p. 1961).

ii. US Responsibilities Under the Law of Nations

The Founding Generation was well aware of their obligations to the Law of Nations and took strides throughout the 18th century to fulfill these responsibilities. It is well documented that the Founding Generation was concerned about the place of the US within a larger international arena.[22] Through this, the Framers were also concerned about their obligations under the Law of Nations; they "understood that failing to provide redress for private Law of Nations violations was in and of itself a violation." (Brief for Professors Of Legal History, 2021, p. 11; Vattel, 1759, bk. 2, ch. 6, § 77) Violations of the Law of Nations could hold severe consequences: "to uphold the rule of law, all violations were considered gravely serious, whether or not they triggered war, and therefore all violations obligated a response from the sovereign." (Brief for Professors Of Legal History, 2021, p. 11; Vattel, 1759, bk. 2, ch. 6, §§ 72, 77)

For example, several embarrassing international incidents pre-date the ATS and contextualize these concerns. Chief among these was the 1784 Marbois Incident. In 1784, a Pennsylvania court convicted a Frenchman of a Law of Nations violation against a French diplomat. However, though the state court sought redress, the federal government was "effectively powerless in the face of a potential international crisis" because the Articles of

provide redress) (Blackstone, 1769, ch. 5, *68) Thomas Rutherforth also supported this theory (Rutherford, 1832, bk. 2, ch. 9, § 12).

[22] For example, in The Federalist No. 80 Alexander Hamilton makes clear that "[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members." (Hamilton, 1788)

Confederation provided no jurisdiction for such remedies (Brief for Professors Of Legal History, 2021, p. 11) The Continental Congress could only pass a resolution "highly approv[ing]" the state case." (Casto, 1986, p. 492) A similar conundrum occurred when a servant to the Dutch ambassador was arrested by New York authorities and the Dutch government sought relief from the federal government. Again powerless to do anything substantive under the Articles of Confederation, Congress could only pass a resolution urging New York to institute judicial proceedings (Casto, 1986, p. 494). This incident highlighted the weakness of the federal government to fulfill any sort of *legal* obligation under the Law of Nations. This "raised sufficient concerns for the First Congress to seek a federal solution to preempt and rectify such incidents in the future." (Brief for Professors Of Legal History, 2021, p. 13) The ATS, and with it the federalization of the Law of Nations, was a direct response to these fears.

Even after the ATS was instituted, the Founding Generation remained concerned about their obligations to the Law of Nations. For example, recently uncovered letters sent to Secretary of State Thomas Jefferson recounted several instances in which Jefferson explicitly referenced the Law of Nations. In the first incident, three U.S. citizens entered a Spanish territory and "stole" five enslaved persons belonging to a Spanish subject. In the second incident, an American ship captain landed on the Island of St. Domingo, a French territory, and stole several slaves. Shortly thereafter, Jefferson received a letter from a Spanish ambassador "inform[ing] [him] of the robbery" and demanding "reasonable compensation for the damages caused, and the punishment the laws prescribe for offenders." (Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson, 1792) The letter also emphasized the importance of judicial action for the diplomatic relationship between Spain and the US: "We have no doubt that all this will be done, since it is the means not only of preventing in the future similar attempts, but

likewise of consolidating the harmony and good relations, to the preservation of which our two nations are so much disposed." (Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson, 1792) In response, Jefferson promised to "lend to the agent of the parties injured, every aid which the laws permit." (Letter from Thomas Jefferson to Jean Baptiste Ternant, 1792) Elsewhere, Jefferson looked to the ATS as an option for civil remedy in these cases (Jefferson Opinion on Offenses against the Law of Nations, 1792).

In contrast to Justice Thomas' concerns that invoking the ATS would "invariably" invoke foreign policy concerns, these incidents prove the opposite concern. It was inaction, and not action, which threatened war and diplomatic strife when the Law of Nations was violated. These letters also confirm that the ATS was meant to expand past Blackstone's three initial causes of action. Though robbery was not included on the list, it was still assumed to be presumptively valid within the preserved conversations.

iii. Modern Conceptions of the Law of Nations

Though the language regarding the Law of Nations has evolved substantially since Vattel, Jefferson, and Blackstone, the Framers' preoccupation with international legal obligations and norms persists today. Language in *amicus curiae* briefs submitted by foreign governments, international legal scholars, and other professionals largely supports this analysis by outlining diverse foreign policy interests pursued by ATS litigation. For example, former government officials in support of the respondents in *Nestlé* argued that closing the door to liability under the ATS would "contribute to a vicious cycle whereby corporations could repeatedly relocate their overseas operations to take advantage of the lowest available labor and human rights standards." (Brief Of Former Government Officials, 2021, p. 22) They cited "decades of experience with suits against U.S. corporations under the ATS" and argued that the US Attorney General could

not point to a "single instance of damage to the U.S. foreign policy." (Brief Of Former Government Officials, 2021, p. 5) Instead, they highlighted the foreign policy concerns in barring litigation: "U.S. foreign policy has consistently supported international law and required U.S. citizens, including U.S. corporations, to comply" with the "clear norms against slavery, forced labor, and human trafficking." (Brief Of Former Government Officials, 2021, p. 5) Pointing to Executive Order 13126,[23] the TVPA, recent statements from executive department officials,[24] the United Nations Guiding Principles on Business and Human Rights, and other statements, policies, and directives, the *amici* concluded that barring liability under the ATS "flatly offends U.S. foreign policy." (Brief Of Former Government Officials, 2021, p. 27)

Other *amici* made similar arguments. In a brief submitted by international law scholars, former diplomats and practitioners, *amici* argued that "allowing a civil action under the ATS against those who aid and abet human trafficking, child slavery, and the worst forms of child labor" would advance "U.S. interests in upholding its international obligations to ensure accountability for perpetrators." (Brief of International Law Scholars, 2021, p. 31) The brief submitted by Oxfam America and Professors of Economics substantiated this point with one of their own: "corporate civil liability under the ATS is an important and economically efficient means of enforcing laws against the most egregious human rights abuses." (Brief Of Amici Curiae Oxfam America and Professors Of Economics Joseph E. Stiglitz And Geoffrey M. Heal, 2021, p. 6) In this view, supporting ATS liability is an important foreign policy goal in line with

[23] Executive Order 13126 directs that "executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor." (Exec. Order No. 13,126, 1999).

[24] Pointing to Secretary of State Michael Pompeo's remarks at a launch ceremony: "tragic examples" of forced labor in Burma and North Korea and declared that the United States "will not stop until human trafficking is a thing of the past." (Pompeo, 2018)

a shared international mission to bring justice and accountability to those who violate human rights.

Beyond these obligations to US foreign policy itself, *amici* linked these norms back to the Law of Nations. Writing in support of respondents in *Nestlé*, the Center for Global Justice argued that "the Law of Nations speaks with clarity and consistency: slave labor – especially child slave labor – is a profoundly barbaric practice to be wholly condemned." (Brief Of Amicus Curiae Center For Global Justice, 2021, p. 4) While acknowledging the foreign-policy concerns about ATS overreach, the *amici* argued that "these very considerations" encourage the "exercise of federal judicial power" when American entities "knowingly countenance the gross violation of fundamental international norms." (Brief Of Amicus Curiae Center For Global Justice, 2021, p. 5) The *amici* found it compelling that "not one foreign state has come forward in this case to warn of potential diplomatic friction… No state or foreign entity has yelled 'stop.'" (Brief Of Amicus Curiae Center For Global Justice, 2021, p. 14) In this regard, they concluded that any conclusion to the contrary would be "simply too extravagant to be maintained." (Brief Of Amicus Curiae Center For Global Justice, 2021, p. 16)

Of course, many circumstances are less easily discernible than child slave labor. As Justice Sotomayor makes clear in her concurrence to *Nestlé*, courts must carefully balance the diplomatic costs of allowing an ATS suit and the benefits of providing redress. This balancing test will occasionally, in "some subset of cases," tip the other way. In these circumstances, the most prudent, diplomatically responsible action would be to prevent the suit from proceeding (Nestlé USA, Inc. v. Doe, 2021, p. 1939). Allowing the ATS to recognize new causes of action under the Law of Nations does not mean that *every* suit will be brought to completion. To the contrary, courts are well-equipped to utilize a plethora of "tools" to resolve the tension between

diplomatic interests and the interests of the victims of abuse (Nestlé USA, Inc. v. Doe, 2021, p. 1948). These tools include "limits on personal jurisdiction," "case-by-case deference to the political branches," "doctrines of exhaustion," "forum non conveniens," and "international comity." (Nestlé USA, Inc. v. Doe, 2021, p. 1948; Kiobel v. Royal Dutch Petroleum Co., 2013, p. 133)

As such, even though several foreign nations have written *amicus* briefs urging caution as to the use of the ATS,[25] federal courts are "particularly capable" of resolving these concerns and exercising reason and balance. By no means do these opinions require throwing the baby out with the bathwater and abandoning ATS liability altogether. In fact, these briefs largely support the view advanced by Justice Sotomayor: the Federal Judiciary should employ the plethora of doctrinal tools at its disposal to rule out cases that disproportionately burden diplomatic interests. Both the foreign governments, and Justice Sotomayor appear confident that the federal judiciary is well-equipped and competent to resolve these tensions. For example, a brief submitted by the Republic of Germany urges the court to only hear "ATS cases brought by foreign plaintiffs against foreign corporate defendants concerning foreign activities where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus." (Brief Of The Federal Republic Of Germany, 2021) This concern points directly to the *forum non conveniens* principle. The Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland were even more direct, urging that if the Court "allows some implied right of action under the ATS, it should

[25] Justice Thomas relies heavily on these amicus briefs in his majority opinion, as evidence of the dangerous foreign policy concerns of ATS litigation. But, as Justice Sotomayor notes, "he offers no meaningful support for that sweeping assertion" beyond these briefs and couches his argument instead in unfounded "pessimism" as to the institutional capacities of federal courts to resolve these concerns (Nestlé USA, Inc. v. Doe, 2021, p. 1948).

make very clear that comity and *forum non conveniens* principles apply." (Brief Of The Governments Of The Commonwealth Of Australia, The Swiss Confederation And The United Kingdom Of Great Britain And Northern Ireland, 2021)

Justice Sotomayor criticizes Justice Thomas for grossly overreacting "to a manageable (and largely hypothetical) problem." (Nestlé USA, Inc. v. Doe, 2021, p. 1949) She argues that courts, as "bodies specifically tasked with, and particularly capable of, interpreting and applying laws," are institutionally equipped to handle balancing diplomatic interests and ATS liability. After all, this was the original purpose of the ATS. She notes that "[i]t would be surprising (and, I suspect, distressing) to the Congress that enacted the ATS to learn that federal courts lack institutional capacity to do the very thing the ATS presumes they will do." (Nestlé USA, Inc. v. Doe, 2021, p. 1949)

But this is precisely the issue. By casting aside the entirety of the ATS, Justice Thomas undermines the original intent, purpose, and goal of the statute. His legal argument is deeply antithetical not only to the very history of the statute, but also to contemporary understandings of the Law of Nations. Even though the details of the *Cisco Systems* decision allowed the Court to weasel through the narrow hole left by Justice Thomas, this does not mean that other cases will necessarily fare similarly. Furthermore, it is feasible, if not likely, that the 9th Circuit's reasoning will be appealed to the Supreme Court, likely resulting in a disappointing outcome for the plaintiffs. Because of this, Justice Thomas' transformation of the *Sosa* standard is incompatible with history and tradition, and legal reform should revive the *Sosa* standard to its previous configuration.

Part IV: Policy Recommendations

Though both legal standards could be achieved through judicial reform at the Supreme Court level, the judicial politics of this transformation seem increasingly unlikely. In particular, the conservative majority of the Court has demonstrated its extreme hesitancy towards any sort of legal reform to ATS doctrine and have repeatedly dismissed any alternative readings of history. As such, a more feasible solution would look beyond the competencies of the courts themselves, and instead return the question of extraterritoriality to the place it began: Congress. Both alternative legal standards proposed above could be implemented through federal statutory reform, thus overcoming the presumption against extraterritoriality and broadening ATS causes of action.

A. Clarifying the Presumption Against Extraterritoriality

Federal statutory reform could resolve the presumption against exterritoriality and implement Justice Breyer's alternative legal standard. In *Morrison*, the Court was clear that Congress could "provide explicitly for the extraterritorial application" of a statute, thereby clarifying its scope and rebutting the presumption against extraterritoriality (Morrison v. National Australia Bank Ltd., 2010, p. 265). In *Nestlé*, Justice Thomas emphasized that "[w]hether and to what extent defendants should be liable under the ATS . . . lies within the province of the Legislative Branch." (Nestlé USA, Inc. v. Doe, 2021, p. 1942) In order to answer this question, Congress could explicitly pass legislation clarifying that the ATS could legally apply extraterritorially. Under the guidance of such a clarification, courts could consider substantive interests such as safe harbor norms when considering whether to take up extraterritorial ATS cases. If the Court determined that no such safe harbor norms or other national interests were at stake, it could employ a plethora of doctrinal tools, such as "case-by-

case deference to the political branches," "doctrines of exhaustion," "forum non conveniens," and "international comity" to extinguish the case (Nestlé USA, Inc. v. Doe, 2021, p. 2091). This process would allow for a more holistic consideration of policy interests when taking up ATS cases.

In May 2022, Senators Dick Durbin and Sherrod Brown introduced the Alien Tort Statute Clarification Act (ATSCA). The Statute provides that "the district courts of the United States have extraterritorial jurisdiction over any tort [covered by the ATS if] . . . an alleged defendant is a national of the United States or an alien lawfully admitted for permanent residence." (Durbin, 2022) The Findings of the Bill point to two significant concerns: first that "human rights abusers continue to seek refuge in the United States" and second that "corporations commit or aid and abet human rights violations directly and through their supply chains." (Durbin, 2022, p. 3-4) They conclude that both "erode[] the foreign policy interests of the United States and the priorities of Congress" and "undermine[] the standing of the United States and its capacity to speak with authority on matters of human rights." (Durbin, 2022, p. 4)

The ATSCA would leave *Jesner* in place, meaning that the ATS would still not confer jurisdiction for foreign plaintiffs to sue foreign corporations for a tort occurring in a foreign nation. This would address the concerns raised by several foreign nations in amicus briefs. For example, the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands filed a joint brief in support of the respondents in *Kiobel*, urging the court to recognize that cases involving "a class of foreign residents suing a foreign corporation for allegedly assisting a foreign government" does not "provide any recognizable basis for the exertion of jurisdiction by the U.S. courts under international law." (Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands,

2021, p. 8) The ATSCA would continue to respect these concerns, instead focusing on instances where a foreign defendant either took up safe harbor in the US, thus implicating US interests in adhering to safe harbor norms, or was a US national, again implicating US interests in regulating the conduct of its citizens. By explicitly considering these policy concerns, the ATSCA would effectively implement Justice Breyer's alternative standard for the review of ATS cases by grounding a justification of territoriality on the substantive policy concerns of that specific instance of litigation.

Still, even despite its advantages, the path to implementing the ATSCA poses an uphill battle. The first issue with the Act is perhaps self-evident - through the statute was introduced in May of 2022, no action has been taken on it since. This stall is unsurprising in light of overall trends of Congressional gridlock and general dysfunction (Lopez, 2023; Pearlstein, 2023). This dysfunction is especially apparent when it comes to corporate accountability[26] and legislative action on this subject is few and far between (Schrage, 2003). Nonetheless, Congressional intervention remains a plausible if uncertain future for extraterritorial transnational litigation under the ATS. These legislative mechanisms, which are often overlooked in the literature around the ATS, deserve closer consideration and future review.

B. Introducing New Causes of Action Via Congressional Action

As for the extraterritorial scope of the act, the addition of explicit statutory language could clarify the scope of the ATS and recognize new causes of action. Congress first did so in 1991 when it passed the TVPA. The TVPA explicitly recognized liability for those who acted in an official capacity for any foreign nation to commit torture or extrajudicial killings (H.Rept

[26] In 2012 and 2013, the Corporate Accountability Coalition's Congressional Report Card reported abysmal levels of Congressional action for corporate accountability (Simons, 2013).

102-367, Part 1, 1991). Today, Congress could take steps to recognize additional causes of action, such as aiding and abetting liability for corporate accountability. Language could be employed like that in the ATSCA, which noted that foreign policy concerns were "eroded" by aiding and abetting practices (Durbin, 2022). This would circumvent the logic employed by Justice Thomas in *Nestlé* that feared the foreign policy implications of new causes of action. Explicit Congressional recognition could clarify these concerns.

Of course, any action by Congress would encounter the same institutional barriers outlined previously. Gridlock and Congressional wariness towards corporate accountability are still substantial concerns to any statutory action, and the Supreme Court would still have the authority to impose additional jurisdictional obstacles regardless of Congressional action. For this reason, avenues for statutory reform should also be explored beyond the federal level. For example, the enactment of domestic legislation at the state level would avoid the institutional messiness of both Congress and the Supreme Court. One example of such legislation is the California Transparency in Supply Chains Act (SB 657). SB 657 requires disclosure to consumers regarding corporate efforts to "eradicate slavery and human trafficking from their supply chains." (S.B. 657, § 2, subd. (j)) Though victims themselves cannot sue under SB 657, it does provide a potential template for other states to enact similar legislation that provides causes of action like those recognized under the ATS. Further study should closely analyze the viability of these forms of liability.

Further, state law claims in state courts can mirror ATS claims, while circumventing the jurisprudential obstacles posed by the current Supreme Court. At present, these state law claims seem to pose a promising alternative avenue for transnational aiding and abetting litigation outside of the ATS, contingent upon procedural and substantive reform at the state level.

Because the procedural rules governing state court litigation are different between states, *forum non conveniens* motions would likely "be the initial battleground in state court human rights case." (Hoffman and Stephens, 2013) Similarly, statutes of limitations applicable to most state tort claims may pose obstacles to litigation. Statutory reform to personal jurisdiction requirements or statutes of limitations could pose a viable solution for both issues. Substantively, reform to state law may "permit courts to recognize common law torts based on international human rights law." (Hoffman and Stephens, 2013, p. 53) Though this avenue is currently underexplored in the scholarship surrounding ATS claims, it provides a potentially viable solution to these issues.

Conclusion

I return then to the question posed in *Sosa*, *Kiobel*, and *Nestlé*: who are today's pirates? In other words, in an evolving world of legal and ethical norms, what entities represent the same threat "to all of humanity" pirates did in the eighteenth century? In light of *Nestlé* and *Kiobel*, the modern multinational corporation must inspire the same international cooperation, outrage, and multilateral support that originally motivated the Law of Nations to collectively pursue accountability against pirates. There are several crucial similarities between the modern multinational corporation and pirates of years past. First, the effects of multinational corporations cannot be easily contained within one sovereign jurisdiction. In the early Roman Empire, the universal threat of pirates united the entire Eastern Mediterranean in a common pursuit, because every nation was potentially at threat of either aiding or abetting or falling victim to the crimes of pirates. The multinational corporation poses a similar threat. Cisco Systems, for example, facilitated the torture, cruel inhuman and degrading treatment, and forced labor of thousands of

people of China, while headquartered in the United States, operating research labs in Beijing, Tokyo, Berlin, Stockholm, London, and Paris, and manufacturing across Europe, Asia, and Latin America (US SEC Annual Report, 2002). Like pirates, the multinational corporation belongs "everywhere and nowhere," invoking the responsibilities of multiple nations, and requiring their cooperation. The Court has also made clear that "[l]ike the pirates of the 18th century, today's torturers, slave traders, and perpetrators of genocide are "'hostis humani generis, an enemy of all mankind.'" (Sosa v. Alvarez-Machain et al., 2004, p. 732) The egregiousness of their crimes makes them "fair game wherever found." (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 131) In common law, accessory liability places equal responsibility on the abettor who had the authority and position to "compel," "urge" or facilitate a crime. As aiding and abetting liability becomes an increasingly common allegation against multinational corporations, those guilty of accessory crimes also become hostis humani generis, enemy of all mankind.

In 18th century America, even the "mere presence" of pirates on US jurisdictional soil implicated national interests in "not providing a safe harbor for an 'enemy of all mankind.'" (Kiobel v. Royal Dutch Petroleum Co., 2013, p. 140) So too, here. A careful reading of the history and legacy of the ATS makes clear that the ATS was always meant to evolve, react, and grow with international legal standards. And yet, the narrowing of the ATS comes at a striking moment for transnational litigation, corporate accountability, and human rights law across the globe. This thesis demonstrates that international norms, both past and present, provide a clear mandate for the US judicial system to provide mechanisms for accountability against those "modern pirates" who aid and abet egregious human rights abuses while cowering comfortably within the safe harbor of US territory. Though further research is necessary to confirm these legal paradigms and further weigh potential policy interventions, it is clear that the current ATS

framework is incompatible with the history, context, and purpose of the ATS itself. But, through legal and policy reform and careful legal innovation, the revival of the ATS is possible, thereby bringing this "legal Lohengrin" in touch with the modern norms of the Law of Nations.

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